RENAULT SA

v.

INOKOM CORPORATION SDN BHD & ANOR AND OTHER APPLICATIONS

COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
ABDULL HAMID EMBONG JCA
KN SEGARA JCA
[APPLICATION NOS: W-02-992-2004, W-03-117-2004 & W-03-116-2004]
21 OCTOBER 2008

ARBITRATION: *Stay of proceedings - Dispute - Breach of Master Agreement - Whether within ambit of arbitration agreement - Whether governing law Arbitration Act 2005 or Arbitration Act 1952 - Arbitration Act 2005, s. 10*

CIVIL PROCEDURE: *Striking out - Statement of claim - Whether disclosed cause of action in tort of conspiracy - Whether elements of tort of conspiracy shown - Whether fit and proper case for striking out as against 2nd defendant/appellant - Whether statement of claim frivolous and vexatious as against 3rd defendant/appellant*

TORT: *Conspiracy - Elements of - Whether an agreement to injure and the acts on execution resulted in damage - Agreement to injure must precede unlawful act in execution of agreement - Whether 1st and 2nd defendants/appellants had conspired - Alleged representation pleaded to be made in 2000 whereas alleged conspiracy pleaded to have occurred in 2001*

TORT: *Conspiracy - Elements of - Failure to plead agreement to conspire, purpose and object of conspiracy - Absence of allegation of overt acts by 3rd defendant/appellant in furtherance of the conspiracy - Whether there can be conspiracy when there was no element of secrecy*

On 3 November 1995 the 1st defendant/appellant, Renault SA (Renault), the 1st plaintiff/respondent, Inokom Corporation Sdn Bhd (Inokom) and the 2nd plaintiff respondent, Quasar Carriage Sdn Bhd (Quasar) entered into the Master Agreement to govern a co-operation on the import and distribution of Renault built-up

vehicles in Malaysia by Quasar (Renault Project) and the manufacture, assembly, sale and distribution of a Malaysian national light commercial vehicle (Inokom Project). The parties also executed the Import and Distribution Agreement on 20 June 1996, the Parts and Component Supply Agreement and Manufacture and Distribution License and Technical Assistance Agreement on 6 September 1996, collectively referred to as the Operating Agreements. On 6 September 1996 Renault also entered into a joint venture agreement with the Berjaya Group Berhad and several other parties, whereupon Renault subscribed to be a minority shareholder in Inokom and agreed that no party shall have any fiduciary obligations to the other. The Master Agreement and Operating Agreements expired on 23 April 2003. The agreements were not renewed by Renault and this was notified to Inokom and Quasar respectively by letters dated 7 March 2002 and 24 October 2002.

Arising from the non-renewal of the Master Agreement and Operating Agreements, Inokom and Quasar issued a writ and statement of claim dated 24 June 2003 claiming damages against Renault and the 2nd and 3rd defendants/appellants namely, Tan Chong Motor Holdings Berhad (Tan Chong) and TC Euro Cars Sdn Bhd (TC Euro) for (a) breach of the Master Agreement by Renault by reason of its decision not to renew the agreement for a further term; (b) fraudulent misrepresentation by Renault in relation to the amount of investment needed for a separate project relating to the manufacture of Renault Kangoo vehicles, namely, the Kangoo Project; (c) breach of fiduciary duties by Renault by reason of the non-renewal of the Master Agreement and alleged fraudulent misrepresentation on the Kangoo Project; and (d) conspiracy between Renault, Tan Chong and TC Euro to injure and defraud Inokom and Quasar by their negotiations relating to the Kangoo Project. Inokom and Quasar's allegations stemmed from the (i) alleged failure by Renault to negotiate in good faith to renew the terms of the agreements six months before their expiration; (ii) alleged fraudulent misrepresentations by Renault as to the USD27 million investment required for the Kangoo Project in 2000 which resulted in Inokom's and Quasar's decision not to participate; and (iii) negotiations with Tan Chong in a project for the manufacture of Renault Kangoo vehicles for a lesser investment (RM20 million) through TC Euro, allegedly discovered by Inokom and Quasar on 23 July 2002.

Renault applied to stay all proceedings in the suit pending reference of the disputes, which are the subject matter of the suit, to arbitration pursuant to s. 6 of the Arbitration Act 1952 (1952 Act). The learned High Court judge dismissed the application. Renault appealed. Both Tan Chong and TC Euro applied to strike out the statement of claim under O. 18 r. 19(1)(a) and/or (b) and/or (c) Rules of the High Court 1980 and/or the inherent jurisdiction of the High Court in separate appeals. Both applications were dismissed and hence Tan Chong and TC Euro appealed. The three mentioned appeals were heard together.

Held (allowing all three appeals with costs and setting aside the orders of the High Court)
Per KN Segara JCA delivering the judgment of the court:

(1) The dispute between the parties in this case clearly arose from or in connection with the performance or interpretation of the Master Agreement relating to its non-renewal, that was, the obligation in art. 6 to discuss in good faith, the extension of the Master Agreement, six months prior to its expiry; and in respect of the allegation of breach of fiduciary duties *ie*, whether a fiduciary relationship exists between the parties and whether there is any breach by Renault. Whether or not there was a breach of the Master Agreement was certainly a dispute which fell squarely within the ambit of the arbitration agreement found in art. 11 of the Master Agreement. The fact that Tan Chong and TC Euro have been named as alleged co-conspirators did not change the fact that a mechanism for resolving disputes between Renault, Inokom and Quasar had been agreed upon. Therefore, that mechanism should be rightly invoked and the disputes resolved by arbitration and not by litigation in court. (paras 13, 14, 15 & 16)

(2) As no arbitral proceedings under art. 11 of the Master Agreement had been commenced as at October 2008, the law governing the arbitration agreement under art. 11 of the Master Agreement is the Arbitration Act 2005 (2005 Act). The 1952 Act no longer had any application to this case if arbitration was commenced pursuant to the Master Agreement anytime hereafter, because s. 51(2) of the 2005 Act shall be applicable to all proceedings commenced on or after 15 March 2006. The provision on stay of court proceedings pending arbitration in

s. 10 of the 2005 Act is mandatory unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed or there is in fact no dispute between the parties with regard to the matters to be referred. The court was unanimous that Renault's application for a stay of all further proceedings in the action pending reference to arbitration should be allowed. (paras 20, 21, 22, 23, 24 & 25)

(3) This was a fit and proper case for the writ and statement of claim to be struck off as against Tan Chong. The very first element to be shown for the tort of conspiracy must be an agreement between two or more persons for the purpose of injuring Inokom and Quasar. 'Agreement' is not limited to a signed and sealed agreement but any informal agreement, including a combination of efforts of the alleged co-conspirators. After that, it has to be shown or at least alleged that acts were done in execution of that agreement which resulted in damage to Inokom and Quasar. In this case, the acts done would have to be unlawful, namely, the alleged false representation made by Renault to Inokom and Quasar as to the level of investment Inokom and Quasar will have to make for the Kangoo Project. (para 33)

(4) The agreement to injure must have been crystallised before the alleged unlawful acts were done in execution or pursuant to the agreement. Inokom and Quasar have pleaded in the statement of claim that the agreement or conspiracy to injure was made sometime in the year 2001 and that the alleged representation was first made by Renault during discussions with Inokom and Quasar regarding the Kangoo Project in the year 2000. There could not in law and in fact conceivably be an agreement or combination or conspiracy between Renault and Tan Chong to injure Inokom and Quasar when the alleged representation was pleaded to have been made in 2000 and the alleged conspiracy was pleaded to have occurred in 2001. The alleged representation was made only by Renault to Inokom and Quasar. The court could not draw, from Inokom's and Quasar's bare allegation that Renault had made the alleged representation to them, an inference or conclusion that Renault and Tan Chong had conspired in any way in the making of the said representation. As there was no cause of action in the tort of

conspiracy against Tan Chong, the appeal was allowed and the statement of claim against Tan Chong was struck off. *Yap JH v. Tan Sri Loh Boon Siew & Ors* (foll). (paras 34, 36, 39 & 40)

(5) There was no allegation of any overt acts carried out by TC Euro in the pleadings and by necessary implication TC Euro had not carried out any overt acts. Besides the absence of allegations of overt acts on the part of TC Euro the Statement of Claim had also failed to plead the agreement between the defendants to conspire and state precisely what was the purpose or what were the objects of the alleged conspiracy. The statement of claim also failed to state with clarity and precision the overt acts which were alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy. Inokom and Quasar had knowledge of the level of investment intended to be put in by Tan Chong. Going by the dictionary definition of "conspiracy" there could never have been any conspiracy when all element of secrecy was lost, because Inokom and Quasar themselves were informed and had full knowledge of Tan Chong's action. There was is no cause of action in the tort of conspiracy as against TC Euro. The statement of claim was vexatious and frivolous. The constituent ingredients of the alleged conspiracy by TC Euro must be pleaded. Thus the appeal was allowed and the statement of claim against TC Euro was struck off. *Marrinam v. Vibart*, affirmed [1963] 1 QB 528 (refd). (paras 42, 43, 44, 45, 46, 47 & 48)

Bahasa Malaysia *Translation Of Headnotes*

Pada 3 November 1995, responden pertama/perayu, Renault SA (Renault), plaintif pertama/responden, Inokom Corporation Sdn Bhd (Inokom) dan plaintif kedua/responden, Quasar Carriage Sdn Bhd (Quasar), memasuki satu Perjanjian Induk untuk pentadbiran kerjasama atas impot dan pembahagian pembinaan kenderaan-kenderaan Renault di Malaysia oleh Quasar (Projek Renault) dan pembuatan, pemasangan, penjualan dan pengedaran kenderaan nasional komersial ringan (Projek Inokom). Pihak-pihak terlibat juga melaksanakan Perjanjian Impot dan Pengedaran pada 20 Jun 1996, Perjanjian Penyediaan Bahagian dan Komponen dan Lesen Pembuatan dan Pengedaran dan Perjanjian Bantuan Teknikal pada 6 September 1996, yang kesemuanya dirujuk sebagai Perjanjian Pengendalian. Pada 6 September 1996 Renault juga memasuki

perjanjian perniagaan bersama dengan Berjaya Group Berhad dan beberapa pihak yang lain, di mana Renault menjadi pemegang saham minoriti di Inokom dan bersetuju bahawa tiada pihak mempunyai obligasi fidusiari terhadap yang lain. Perjanjian Induk dan Perjanjian Pengendalian tamat tempohnya pada 23 April 2003. Perjanjian-perjanjian tidak diperbaharui oleh Renault dan Inokom dan Quasar telah diberi notifikasi melalui surat-surat bertarikh 7 Mac 2002 dan 24 Oktober 2002.

Berbangkit daripada Perjanjian Induk dan Perjanjian Pengendalian yang tidak diperbaharui, Inokom dan Quasar mengeluarkan writ dan penyataan tuntutan bertarikh 24 Jun 2003 menuntut ganti rugi terhadap Renault dan defendan-defendan/perayu-perayu kedua dan ketiga, iaitu Tan Chong Motor Holdings Berhad (Tan Chong) dan TC Euro Cars Sdn Bhd (TC Euro) untuk (a) kemungkiran Perjanjian Induk oleh Renault kerana telah memutuskan untuk tidak memperbaharui perjanjian: (b) misrepresentasi fraud oleh Renault berkaitan dengan jumlah pelaburan yang diperlukan untuk projek berasingan yang berkaitan dengan pembuatan kenderaan Renault Kangoo, iaitu Projek Kangoo; (c) kemungkiran kewajipan-kewajipan fidusiari oleh Renault atas alasan Perjanjian Induk tidak diperbaharui dan tuduhan misrepresentasi fraud atas Projek Kangoo dan (d) konspirasi di antara Renault, Tan Chong dan TC Euro untuk menjejaskan dan menipu Inokom dan Quasar melalui perundingan mereka berkaitan dengan Projek Kangoo. Alegasi-alegasi Inokom dan Quasar datangnya dari (1) tuduhan kegagalan Renault untuk berunding dengan suci hati memperbaharui terma-terma perjanjian enam bulan sebelum ia luput; (ii) tuduhan misrepresentasi fraud oleh Renault mengenai pelaburan USD27 juta yang diperlukan untuk Projek Kangoo pada tahun 2000 yang mengakibatkan keputusan Inokom dan Quasar untuk tidak mengambil bahagian dan (iii) perundingan dengan Tan Chong dalam projek untuk pembuatan kenderaan Renault Kangoo untuk pelaburan yang kurang (RM20 juta) melalui TC Euro, yang dituduh ditemui oleh Inokom and Quasar pada 23 Julai 2002.

Renault memohon untuk menggantung semua prosiding di dalam guaman sambil menunggu rujukan pertikaian-pertikaian, yang menjadi halperkara guaman ini, untuk timbangtara di bawah s. 6 Akta Timbangtara 1952 (Akta 1952). Hakim Mahkamah Tinggi telah menolak permohonan. Renault merayu. Kedua-dua Tan Chong dan TC Euro memohon untuk membuang penyataan tuntutan di

bawah A. 18 k. 19(1)(a) dan/atau (b) dan/atau (c) Kaedah-kaedah Mahkamah Tinggi 1980 dan/atau bidangkuasa semulajadi Mahkamah Tinggi di dalam rayuan-rayuan yang berlainan. Kedua-dua permohonan telah ditolak dan oleh itu Tan Chong dan TC Euro membuat rayuan. Ketiga-tiga rayuan dibicara bersama.

Diputuskan (membenarkan ketiga-tiga rayuan dengan kos dan mengenepikan perintah Mahkamah Tinggi)
Oleh KN Segara HMR menyampaikan penghakiman mahkamah:

(1) Pertikaian di antara pihak-pihak di dalam kes ini berbangkit dari atau berkaitan dengan pelaksanaan atau tafsiran Perjanjian Induk yang ada kena-mengena dengan ketidakperbaharuan, iaitu, kewajipan dalam art. 6 untuk berbincang dalam suci hati, lanjutan Perjanjian Induk, enam bulan sebelum tarikh luputnya; dan mengenai tuduhan kemungkiran kewajipan-kewajipan fidusiari contohnya sama ada perhubungan fidusiari wujud di antara pihak-pihak dan sama ada berlakunya kemungkiran oleh Renault. Sama ada berlakunya kemungkiran Perjanjian Induk adalah pertikaian yang termasuk dalam rangkuman perjanjian timbangtara yang ditemui dalam art. 11 Perjanjian Induk. Fakta bahawa Tan Chong dan TC Euro telah dinamakan sebagai pengkomplot-pengkomplot bersama tidak mengubah fakta bahawa mekanisme untuk menyelesaikan pertikaian di antara Renault, Inokom dan Quasar telah dipersetujui. Oleh itu, mekanisme itu sepatutnya digunakan dengan betul dan pertikaian-pertikaian diselesaikan oleh timbangtara dan bukan melalui litigasi di mahkamah.

(2) Kerana tiada permulaan prosedur timbangtara di bawah art. 11 Perjanjian Induk setakat bulan Oktober 2008, undang-undang yang mengawal perjanjian timbangtara di bawah art. 11 Perjanjian Induk adalah Akta Timbangtara 2005 (Akta 2005). Akta 1952 bukan lagi digunapakai di dalam kes ini jika timbangtara dimulakan di bawah perjanjian induk pada bila-bila masa selepas itu, sebab s. 51(2) Akta 2005 boleh digunapakai di dalam semua prosiding yang bermula pada atau selepas 15 Mac 2006. Peruntukan mengenai penggantungan prosiding mahkamah sambil menunggu timbangtara dalam s. 10 Akta 2005 adalah wajib kecuali jika mahkamah mendapati bahawa perjanjian timbangtara adalah tidak sah dan terbatal, tidak boleh dikendalikan atau tidak dapat dilaksanakan atau sememangnya

A tidak ada pertikaian antara pihak-pihak mengenai halperkara-halperkara yang dirujuk. Mahkamah sebulat suara berpendapat bahawa permohonan Renault untuk penggantungan semua prosiding-prosiding di dalam tindakan ini sambil menunggu rujukan untuk timbangtara dibenarkan.

B

(3) Ini adalah kes yang wajar dan sesuai untuk writ dan penyataan tuntutan dibuang terhadap Tan Chong. Elemen yang pertama sekali menunjukkan tort konspirasi mestilah perjanjian di antara dua atau lebih orang untuk tujuan menjejaskan Inokom dan
C Quasar. 'Perjanjian' tidak dihadkan ke perjanjian yang ditandatangani dan dimeterai tetapi apa-apa perjanjian yang tidak rasmi, termasuk kombinasi percubaan-percubaan pengkomplot-pengkomplot bersama yang dituduh. Selepas itu, ia patut memperlihatkan atau mendakwa bahawa tindakan-tindakan
D selepas pelaksanaan perjanjian mengakibatkan kerugian kepada Inokom dan Quasar. Di dalam kes ini, tindakan-tindakan yang dilakukan mestilah melanggar undang-undang, contohnya seperti, dakwaan representasi palsu yang dibuat oleh Renault kepada Inokom dan Quasar mengenai tahap pelaburan yang
E perlu dibuat oleh Inokom dan Quasar untuk Projek Kangoo.

(4) Persetujuan untuk menjejaskan mesti diperjelaskan sebelum dakwaan tindakan-tindakan yang melanggar undang-undang dilakukan dalam pelaksanaan atau di bawah perjanjian. Inokom
F dan Quasar telah membuat pliding di dalam penyataan tuntutan bahawa perjanjian atau konspirasi untuk menjejaskan dibuat dalam tahun 2001 dan dakwaan representasi dibuat pertama kalinya oleh Renault semasa perbincangan dengan Inokom dan Quasar mengenai Projek Kangoo pada tahun 2000. Tidak
G mungkin dari segi undang-undang dan fakta wujudnya perjanjian atau kombinasi atau konspirasi di antara Renault dan Tan Chong untuk menjejaskan Inokom dan Quasar apabila pertuduhan representasi diplidkan berlaku pada tahun 2000 dan pertuduhan konspirasi diplidkan berlaku pada tahun 2001.
H Pertuduhan representasi dibuat oleh Renault sahaja kepada Inokom dan Quasar. Mahkamah tidak boleh membuat, dari dakwaan kosong Inokom dan Quasar bahawa Renault telah membuat representasi yang didakwa kepada mereka, inferens atau kesimpulan bahawa Renault dan Tan Chong telah berpakat
I dalam membuat representasi tersebut. Kerana tiada kausa

tindakan di dalam tort konspirasi terhadap Tan Chong, rayuan dibenarkan dan penyataan tuntutan terhadap Tan Chong dibatalkan.

(5) Tidak terdapat apa-apa dakwaan mengenai perbuatan tanpa selindung yang dijalankan oleh TC Euro di dalam pliding-pliding dan secara tersirat TC Euro tidak menjalankan apa-apa perbuatan tanpa selindung. Selain daripada tiada kewujudan dakwaan-dakwaan perbuatan tanpa selindung oleh TC Euro, penyataan tuntutan juga gagal memplidkan perjanjian di antara defendan-defendan untuk mengkomplot dan menyatakan dengan jelas apa tujuan atau apa objektif konspirasi yang didakwa itu. Penyataan tuntutan juga gagal menyatakan dengan jelas dan tepat perbuatan tanpa selindung yang didakwa dilakukan oleh setiap pengkomplot berkaitan dengan dan perlanjutan konspirasi. Inokom dan Quasar berpengetahuan mengenai tahap pelaburan yang Tan Chong ingin melabur. Mengikut definasi kamus perkataan "conspiracy", tidak terdapat konspirasi apabila semua elemen rahsia hilang, sebab Inokom dan Quasar diberitahu dan mempunyai pengetahuan mengenai tindakan Tan Chong. Tidak terdapat tindakan kausa di dalam tort konspirasi terhadap TC Euro. Penyataan tuntutan adalah menyusahkan dan remeh. Bahan-bahan konstituen tort konspirasi oleh TC Euro mestilah diplidkan. Oleh itu, rayuan dibenarkan dan penyataan tuntutan terhadap TC Euro dibatalkan.

Case(s) referred to:
Yap JH v. Tan Sri Loh Boon Siew & Ors [1991] 3 CLJ 2960; [1991] 4 CLJ (Rep) 243 HC ***(foll)***

Legislation referred to:
Arbitration Act 1952, ss. 6, 25(2)
Arbitration Act 2005, ss. 10, 51(2)
Rules of High Court 1980, O. 18 rr. 19(1)(a), (b), (c)

(Application No: W-02-992-04)
For the appellant - Tommy Thomas (KY Chew & Elaine Yap with him); M/s Wong & Partners
For the respondent - RS Nathan (R Thayalan with him); M/s R Thayalan

(Application No: W-03-116-04)
For the appellant - KM Chan (Veronica Ong with him); M/s Lim Kian Leong & Co
For the respondent - RS Nathan (R Thayalan with him); M/s R Thayalan

(Application No: W-03-117-04)
For the appellant - Wong Chong Wah (Wong Chee Lin with him); M/s Skrine
For the respondent - RS Nathan (R Thayalan with him); M/s R Thayalan

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S2-22-822-2003]

Reported by Susheila Sreedharan

JUDGMENT

KN Segara JCA:

[1] The 1st plaintiff/respondent, Inokom Corporation Sdn (Inokom) and the 2nd plaintiff/respondent, Quasar Carriage Sdn Bhd (Quasar) issued a writ and statement of claim dated 24 June 2003 claiming damages against the 1st, 2nd, 3rd defendants/appellants, namely, Renault SA (Renault), Tan Chong Motor Holdings Berhad (Tan Chong) and TC Euro Cars Sdn Bhd (TC Euro) for:

(i) Breach of contract as pleaded in paras. 28 and 29 of the statement of claim;

(ii) Breach of fiduciary duties as pleaded in paras. 30(1) to 30(16) of the statement of claim;

(iii) Fraudulent Misrepresentation/Deceit by Tan Chong to Inokom and Quasar to reject the investment for the Kangoo Project as pleaded in paras. 32(1) and (2) of the statement of claim;

(iv) Renault conspiring with Tan Chong and TC Euro to injure Inokom and Quasar.

[2] By summons in chambers dated 30 July 2003 (encl. 11) Renault applied to stay all proceedings in the suit pending reference of the disputes, which are the subject matter of the suit, to arbitration pursuant to s. 6 of the Arbitration Act 1952 (1952 Act). The learned High Court judge dismissed the application. Renault appealed and the appeal is registered as W-02-992-2004.

[3] By summons in chambers dated 31 July 2003 (encl. 13) Tan Chong applied to strike out the statement of claim under O. 18 r. 19(1)(a) and/or (b) and/or (c) Rules of High Court 1980 and/or the inherent jurisdiction of the High Court. The application was dismissed by the learned High Court judge on 20 May 2004. Tan Chong appealed and the appeal is registered as W-03-117-2004.

[4] By summons in chambers dated 1 August 2003 (encl. 15) TC Euro applied to strike out the statement of claim under O. 18 r. 19(1)(a) and/or (b) and/or (c) Rules Of High Court 1980 and/or the inherent jurisdiction of the High Court. The application was dismissed by the learned High Court judge on 20 May 2004. TC Euro appealed and the appeal is registered as W-03-116-2004.

[5] The three appeals were heard together before us without the benefit of any written grounds of judgment of the learned High Court judge. Based on the pleadings, the affidavit evidence and the submissions of the respective counsel for the appellants and respondents before us, we allowed all the three appeals with costs and set aside the orders of the High Court.

Appeal No: W-02-992-2004

[6] On 3 November 1995 Renault, Inokom and Quasar had entered into the master agreement with terms and conditions to govern a co-operation on:

(1) the import and distribution of Renault built-up vehicles in Malaysia by Quasar (Renault Project); and

(2) the manufacture, assembly, sale and distribution of a Malaysian national light commercial vehicle (Inokom Project).

[7] In connection with the above projects, the parties also executed the following agreements on 20 June 1996 and 6 September 1996, collectively referred to as the operating agreements, namely:

(a) Import and Distribution Agreement - 20 June 1996;

(b) Parts and Component Supply Agreement - 6 September 1996;

(c) Manufacture and Distribution License and Technical Assistance Agreement - 6 September 1996;

[8] On 6 September 1996 Renault also entered into a joint venture agreement with the Berjaya Group Berhad and several other parties, whereupon Renault subscribed to be a minority shareholder in Inokom and agreed that no party shall have any fiduciary obligations to the other.

Joint Venture Agreement

(Industri Otomotif Komersial (M) Sdn Bhd)

25.3 Relationship of Parties

Nothing in this Agreement shall be construed as constituting any of the Parties as a partner, agent or representative of the other. **No Party shall have any fiduciary obligations** to the other arising **out of the ownership of shares** in **Inokom** or from this Agreement.

Nothing in this Agreement shall be construed as giving any Party any right or authority to act for or represent or otherwise assume any obligation on behalf of or in the name of any other and each Party agrees to indemnify and hold harmless each of the other from and against any claims losses or damages whatsoever in respect of liabilities incurred as a result of its unauthorized act or representation or assumption on behalf of or in the name of any other.

(emphasis added)

[9] Under art. 7 of the master agreement, the said agreement shall expire on termination or on the date of expiry of the operating agreements. Under art. 6 the duration of the agreements was for a period of five years from the "Inokom Commercialisation Authorisation Date".

[10] The "Inokom Commercialisation Authorisation Date" was on 24 April 1998. Thus, the master agreement and operating agreements expired on 23 April 2003. The agreements were not renewed by Renault - this was documented in notifications:

(a) To Inokom by letter dated 7 March 2002; and

(b) To Quasar by letter dated 24 October 2002.

[11] Arising from the non-renewal of the master agreement and operating agreements, the claims made against Renault by Inokom and Quasar as pleaded in the suit, are as follows:

(a) Breach of the master agreement by Renault by reason of its decision not to renew the agreement for a further term (see para. 28 of statement of claim);

(b) Breach of fiduciary duties by Renault by reason of the non-renewal of the master agreement and alleged fraudulent misrepresentation on the Kangoo Project (see paras. 20-30 of the statement of claim);

(c) Fraudulent misrepresentation by Renault in relation to the amount of investment needed for a separate project relating to the manufacture of Renault Kangoo vehicles, namely, the Kangoo Project (see paras. 32-36 statement of claim); and

(d) Conspiracy between Renault, Tan Chong and TC Euro to injure and defraud Inokom and Quasar by their negotiations relating to the Kangoo Project (see paras. 41-42 of the statement of claim).

[12] The above allegations by Inokom and Quasar stem from the following:

(a) Alleged failure by Renault to negotiate in good faith to renew the terms of the agreements six months before their expiration;

(b) (i) Alleged fraudulent misrepresentations by Renault as to the USD27 million investments required for the Kangoo Project in 2000 (unrelated to the Renault and Inokom Projects) which resulted in Inokom's and Quasar's decision not to participate;

(ii) Negotiations with Tan Chong in a project for the manufacture of Renault Kangoo vehicles for a lesser investment (RM20 million) through TC Euro, allegedly discovered by Inokom and Quasar on 23 July 2002.

[13] We are unanimous that the dispute between the parties in this case clearly arises from or in connection with the performance or interpretation of the master agreement relating to:

(a) its non-renewal, that is, the obligation in art. 6 to discuss in good faith, the extension of the master agreement, 6 months prior to its expiry; and

(b) in respect of the allegation of breach of fiduciary duties - the basic issue of whether a fiduciary relationship exists between the parties and whether there is any breach by Renault.

[14] Inokom and Quasar seem to suggest, in the pleadings, that the fiduciary relationship is expressly stated in the agreements.

[15] Whether or not there was a breach of the master agreement is certainly a dispute which falls squarely within the ambit of the arbitration agreement found in art. 11 of the master agreement which reads:

> All disputes arising from or in connection with the performance or interpretation of this agreement shall be settled by the parties through friendly negotiations between authorized representatives of the parties. If an amicable solution cannot be reached between the parties within two months after the beginning of the said negotiations, such dispute shall be submitted to arbitration.

[16] The fact that Tan Chong and TC Euro have been named as alleged co-conspirators does not change the fact that a mechanism for resolving disputes between Renault, Inokom and Quasar has been agreed upon. Therefore, mechanism should be rightly invoked and the disputes resolved by arbitration and not by litigation in court. The parties should honour art. 11 and give it life and meaning, to resolve disputes amicably. A devious attempt to circumvent art. 11, by instituting an action against Renault jointly with parties not subject to the arbitration clause, should not be encouraged.

[17] The action as between Inokom, Quasar and the alleged co-conspirators (Tan Chong & TC Euro, who were not parties to the arbitration clause) can be stayed pending the outcome of the arbitration.

[18] We are not persuaded by counsel for Inokom and Quasar that the disputes are inseparable and unsuitable for determination by an arbitral proceeding, as it involves third parties to the master agreement who are not subject to the arbitration clause. We are not persuaded that any award made by the arbitral tribunal against Renault would not be binding and enforceable against Tan Chong and TC Euro, to warrant the refusal of stay under s. 6 of the 1952 Act. We are further not persuaded that it is undesirable to have two proceedings before two different tribunals, who might reach inconsistent findings, to warrant the refusal of stay under s. 6 of the 1952 Act. In any event, Tan Chong and TC Euro have applied to have the claim as against them struck off summarily and if they succeed, multiplicity of proceedings is a non issue.

[19] We have borne in mind that the application by Renault was made pursuant to s. 6 of the 1952 Act and that the 1952 Act was repealed with the coming into force of the Arbitration Act 2005 (2005 Act). The 2005 Act came into force on 15 March 2006. Therefore, when the order dismissing the application was made on 15 September 2004, the 2005 Act was not in force yet.

[20] No arbitral proceedings under art. 11 of the master agreement have been commenced to date (that is, October 2008, pending our decision on the appeal by Renault).

[21] In the above scenario, we are unanimous that the law governing the arbitration agreement under art. 11 of the master agreement is the 2005 Act, and that the 1952 Act no longer has any application to the present case before us, if arbitration is commenced pursuant to the master agreement anytime hereafter, because s. 51(2) of the 2005 Act shall be applicable to all proceedings commenced on or after 15 March 2006. Section 51(2) reads:

> (2) Where the arbitral proceedings were commenced before the coming into operation of this Act, the law governing the arbitration agreement and the arbitral proceedings shall be the law which would have applied as if this Act had not been enacted.

[22] The provision on stay of court proceedings pending arbitration is found in s. 10 of the 2005 Act. The requirement to stay is mandatory unless the court finds that:

(i) the arbitration agreement is null and void, inoperative or incapable of being performed; or

(ii) there is in fact no dispute between the parties with regard to the matters to be referred.

[23] Section 10 of the 2005 Act reads:

> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds:
>
> (a) that the agreement is null and void, inoperative or incapable of being performed; or

(b) that there is in fact no dispute between the parties with regard to the matters to be referred.

[24] We have taken note that under the 2005 Act there is no equivalent provision to s. 25(2) of the 1952 Act which provides that in a dispute which involves the question of whether a party has been guilty of fraud, the High Court shall have power to order that the arbitration agreement shall cease to have effect so far as may be necessary to enable that question to be determined by the High Court. It is indisputable, that under the 2005 Act matters of fraud are no longer to be treated in a special category, and is deemed to be within the competence of arbitrators. Widening the scope of the jurisdiction of arbitrators is certainly consistent with current judicial policy to promote and encourage alternative dispute resolutions in lieu of court litigation.

[25] In the above circumstances, and a *fortiori* the 2005 Act, in particular s. 10 thereof, we are unanimous that Renault's application for a stay of all further proceedings in the action pending reference to arbitration should be allowed.

[26] Now we shall deal with the respective applications by Tan Chong and TC Euro to strike off the writ and statement of claim as against each of them.

Appeal No: W-03-117-2004

[27] Tan Chong asserts that art. 8.2 of the master agreement, under the heading "consequences of termination", provides, *inter alia*, that once termination of the master agreement has been effected, each party thereto shall be entitled to conclude agreements with third parties with a view to manufacture, assemble, sell and distribute Renault vehicles in the Territory (Malaysia), as from the effective date of such cessation of the said agreement.

[28] By letters dated 24 October 2002 Inokom and Quasar had been informed that the master agreement will not be renewed after its termination by effluxion of time on 24 April 2003. On 15 May 2003, Renault SAS, that is, Renault's wholly owned subsidiary, entered into a contractual arrangement with TC Euro, a wholly owned subsidiary of Tan Chong, to import and distribute certain models of Renault vehicles.

[29] Tan Chong asserts that Inokom and Quasar have made no complaint or claim in so far as it relates to the fact that there had been negotiations between representatives of Tan Chong and Renault for the assembly, sale and distribution of Renault vehicles, prior to the termination by effluxion of time the contractual relationship between Inokom, Quasar and Renault.

[30] Tan Chong asserts, that based on the statement of claim, there is only one allegation made against Tan Chong - it is in relation to the Kangoo Project. Inokom and Quasar allege in the pleadings that Renault and Tan Chong had conspired with each other by unlawful means to injure Inokom and Quasar so as to deprive them the opportunity of developing the Kangoo Project. The unlawful means used was allegedly a false and fraudulent representation on the part of Renault as to how much Inokom and Quasar ought to invest in order to develop the Kangoo Project. It is asserted that in discussions in the year 2000, Renault had represented to Inokom and Quasar that they had to invest USD27 million, whereas in a meeting between representatives of Tan Chong, Inokom, Quasar and Renault, Tan Chong's director had revealed that the investment cost of the Kangoo Project for Tan Chong was only RM20 million.

[31] Tan Chong maintains that there is no cause of action in the tort of conspiracy to injure and, that on the undisputed facts and on the facts as pleaded, the claim against Tan Chong is devoid of any substance, equivocal, lacking in precision, inconsistent and improbable in itself. We are unanimous and agree that this is a fit and proper case for the writ and statement of claim to be struck off as against Tan Chong.

[32] In regard to the tort of conspiracy, the following need to be satisfied at this interlocutory stage:

(a) an agreement between two or more persons (that is an agreement between Tan Chong and others);

(b) an agreement for the purpose of injuring Inokom and Quasar;

(c) that acts done in execution of that agreement resulted in damage to Inokom and Quasar;

(d) damage is an essential element and where damage is not pleaded the Statement of Claim may be struck out.

[see *Yap JH v. Tan Sri Loh Boon Siew & Ors* [1991] 3 CLJ 2960; [1991] 4 CLJ (Rep) 243 HC]

[33] It is clear that the very first element to be shown must be an agreement between two or more persons for the purpose of injuring Inokom and Quasar. 'Agreement' is not limited to a signed and sealed agreement but any informal agreement, including a combination of efforts of the alleged co-conspirators. After that, it has to be shown or at least alleged that acts were done in execution of that agreement which resulted in damage to Inokom and Quasar. In this case, the acts done would have to be unlawful, namely, the alleged false representation made by Renault to Inokom and Quasar as to the level of investment Inokom and Quasar will have to make for the Kangoo Project.

[34] It is trite law that the agreement to injure must come first (in other words the agreement should have crystallized), before the alleged unlawful acts are done in execution or pursuant to the agreement.

[35] Inokom and Quasar have pleaded in the statement of claim that the agreement or conspiracy to injure was made sometime in the year 2001 (para. 41 statement of claim):

> 41. Sometime in 2001, the representatives from the 1st and 2nd Defendants wrongfully and maliciously conspired and combined amongst themselves to defraud and to injure the Plaintiffs in their said businesses.

[36] Inokom and Quasar have also pleaded that the alleged representation was first made by Renault during discussions with Inokom and Quasar regarding the Kangoo Project in the year 2000 (paras. 30(7) and (8) statement of claim):

> 30. ...
>
> (7) In accordance with ..., the Plaintiffs and the 1st Defendant had, sometime in the year 2000, further discussed the possibility of the 1st Plaintiff assembling, manufacturing and distributing the Renault Kangoo model vehicles in Malaysia.

(8) The 1st Defendant had represented to the Plaintiffs that in order for the Renault Kangoo vehicles to be assembled, manufactured and distributed by the 1st Plaintiff in Malaysia, the 1st Plaintiff ought to invest a sum of about USD27 million (equivalent to about RM102.6 million with an exchange rate of 3.8).

[37] Inokom and Quasar have never denied the fact that the alleged representation was first made by Renault to them in the year 2000.

[38] We are unanimous that there cannot in law and in fact conceivably be an agreement or combination or conspiracy between Renault and Tan Chong to injure Inokom and Quasar when the alleged representation was pleaded to have been made in 2000 and the alleged conspiracy was pleaded to have occurred in 2001.

[39] The alleged representation was made only by Renault to Inokom and Quasar. The court cannot draw, from Inokom's and Quasar's bare allegation that Renault had made the alleged representation to them, an inference or conclusion that Renault and Tan Chong had conspired in any way in the making of the said representation.

[40] We are unanimous that there is no cause of action in the tort of conspiracy against Tan Chong. The appeal is allowed. The Statement of Claim against Tan Chong is struck off.

Appeal No: W-03-116-2004

[41] Moving on to consider the appeal by TC Euro with regards to its application to strike off the writ and statement of claim, it is noted that the statement of claim consisting of 45 paragraphs in all, upon being stripped of its extensive assertions against Renault and Tan Chong, has directed only four paragraphs against TC Euro in support of Inokom's and Quasar's RM150,000,000 claim for conspiracy to injure, namely:

42. In pursuance and in furtherance of the said conspiracy, the Defendants did the following overt acts, namely:

(1) …

(2) …

(3) The 3rd Defendants being the wholly owned subsidiary of the 2nd Defendant was to be used as the vehicle to carry out the agreement reached between the 1st and 2nd Defendants.

(4) Accordingly, the 1st Defendant had entered into an agreement with the 3rd Defendant appointing the 3rd Defendant as the sole assembler, importer and distributor of Renault vehicles in Malaysia.

(5) ...

(6) ...

(a) ...

(b) ...

(c) ...

(d) ...

(e) Therefore, the 1st Defendant had, in furtherance of its conspiracy with the 2nd and 3rd Defendants, made the fraudulent misrepresentation with the intention of injuring the Plaintiffs by depriving the Plaintiffs of the Renault Kangoo project.

43. Each of the acts specified in the preceding paragraphs hereof was done by the representatives of the Defendants on behalf of themselves and their co-conspirators in furtherance of the said conspiracy.

[42] There is no allegation of any overt acts carried out by TC Euro in the pleadings and by necessary implication TC Euro had not carried out any overt acts.

The gist of the tort of conspiracy is not the conspirational agreement alone but that agreement plus the overt acts causing damage (*Marrinam v. Vibart* [1963] 1 QB 234, affirmed [1963] 1 QB 528).

Pleading. The Statement of Claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what was the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury

and damages occasioned to the plaintiff thereby. [The Common Law Library - Number 5 - Precedents Of Pleadings - Section 26 - Conspiracy]

[43] It is to be noted that besides the absence of allegations of overt acts on the part of TC Euro the statement of claim has also failed to plead the agreement between the defendants to conspire and state precisely what was the purpose or what were the objects of the alleged conspiracy. The statement of claim has also failed to set forth with clarity and precision the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy.

[44] According to the *Oxford Advanced Learner's Dictionary*, 7th edn, "conspiracy" means "a secret plan by a group of people to do something harmful or illegal".

[45] Inokom and Quasar had knowledge of the level of investment intended to be put in by Tan Chong and this is patent from the pleadings at para. 42(6)(c):

During a meeting on 23rd July 2002, it was brought to the attention of the Plaintiffs that the total investment to be made by 2nd defendant for the assembly and Manufacture of the Renault Kangoo vehicle is only about RM20 million instead of the sum of about USD27 million quoted to the Plaintiffs.

[46] There are three implications from the above paragraph, namely:

(i) That Tan Chong had been in negotiation with Renault for the Renault Kangoo Project, was already known to Inokom and Quasar;

(ii) That Tan Chong was to invest RM20 million into the project;

(iii) That the above information was brought to the attention of Inokom and Quasar ("brought to the attention of the plaintiffs"). They did not come to know of it by chance or by reason of somebody letting the cat out of the bag on information (secret) they ought not to know.

[47] Going by the dictionary definition of "conspiracy" there could never have been any conspiracy when all element of secrecy is lost, because Inokom and Quasar themselves were informed and had full knowledge of Tan Chong's action.

[48] We are unanimous that there is no cause of action in the tort of conspiracy as against TC Euro. The statement of claim is vexatious and frivolous. Just as fraud must be pleaded with great particularity, so must the constituent ingredients of the alleged conspiracy by TC Euro be pleaded. In the circumstances, for reasons already stated, the appeal is allowed and the statement of claim against TC Euro is struck off.